

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
KTVU, LLC	)	Facility I.D. No. 34564
Licensee of Station KICU-TV	)	NAL/Acct. No.: 201441420036
San Jose, California	)	FRN: 0021245394

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

**Adopted: October 1, 2014**

**Released: October 1, 2014**

By the Chief, Video Division, Media Bureau:

**I. INTRODUCTION:**

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),<sup>1</sup> the Commission finds that KTVU, LLC (the “Licensee”), licensee of Station KICU-TV, San Jose, California (the “Station”), apparently willfully and/or repeatedly violated Sections 73.671 of the Rules by failing to properly identify children’s programming through display on the television screen of the “E/I” symbol. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000).

**II. BACKGROUND:**

2. The Children’s Television Act of 1990 (“CTA”) provides television broadcast licensees with an affirmative obligation to offer programming that meets the educational and informational needs of children (“Core Programming”).<sup>2</sup> Section 73.671 of the Rules requires television broadcast licensees to meet certain criteria in order to demonstrate compliance with the children’s programming obligations set forth by the CTA.<sup>3</sup> In furtherance of the children’s programming obligations established by the CTA, broadcasters are also required to provide certain information to the public and programmers about the children’s programming they air. For example, subsection (c)(5) of the rule requires broadcasters to identify Core Programming by displaying the “E/I” symbol on the television screen throughout the program.<sup>4</sup>

3. On August 1, 2014, the Licensee filed its license renewal application for the Station.<sup>5</sup> In response to Section IV, Question 8 the Licensee certified that it did not identify “each CORE program

<sup>1</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

<sup>2</sup> Pub L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303(a), 303(b), and 394.

<sup>3</sup> Section 73.671 implements the provisions of the CTA by establishing a process for evaluating compliance as part of a broadcaster’s license renewal proceeding. 47 C.F.R. § 73.671(d),(e)(1). Licensees that fail to meet the Commission’s processing guidelines must be referred to the Commission for approval of the CTA portion of their renewal applications. 47 C.F.R. § 73.671(d),(e)(1). The Commission has established specific criteria for determining whether a program qualifies as Core Programming. 47 C.F.R. § 73.671(c).

<sup>4</sup> 47 C.F.R. § 73.671(c)(5); *Children’s Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 22943, 2259-60 (2004) (“2004 Report and Order”).

<sup>5</sup> File No. BRCDDT-20140801ADQ (“KICU-TV Renewal”).

aired at the beginning of the airing of each program.” In Exhibit 25 of the license renewal application, the Licensee admits that the Station failed to properly display the “E/I” symbol during children’s programming aired on one of its digital multicast channels airing Korean-language programming.<sup>6</sup> On September 22, 2014, the Licensee amended its license renewal application to clarify the precise time period it failed to display the E/I symbol. On September 24, 2014 the license renewal application was again amended to state that the Station had experienced similar issues with displaying the E/I symbol on the Station’s Chinese-language digital multicast channel.

4. According to the final amended exhibit, in first quarter 2007 the Station began airing Korean-language programming on one of its digital multicast streams. Initially, “the programmer...did not include the “E/I” symbol,” however, prior to the start of the second quarter 2007, the Station “fixed the problem” and the Korean-language Core Programming was aired with the “E/I” symbol.<sup>7</sup> In first quarter 2012, following a change in the source of the Station’s Korean-language programming, the Station again aired Korean-language Core Programming without displaying the “E/I” symbol. Likewise, in January 2011, the Station began airing Chinese-language programming on a separate digital multicast channel and failed to display the “E/I” symbol during Core Programming. The Station was told by its Korean-language programmer, Korean Broadcasting System (KBS America) that it “did not have English language graphic insertion capability because the Korean language does not use characters from the Roman alphabet” and that “adding the E/I symbol would not be meaningful to the Korean speaking audience.”<sup>8</sup> The Station’s Chinese-language programmer, China Central Television (CCTV), appears to have given the Station a similar explanation. Accordingly, the “E/I” symbol was not displayed during Korean-language Core Programming from first quarter 2012 through September 5, 2014, and the “E/I” symbol has not been displayed during Chinese-language Core Programming since January 2011.<sup>9</sup> In its license renewal application the Licensee has committed to begin displaying the “E/I” symbol during Chinese-language Core Programming no later than October 1, 2014.

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<sup>6</sup> *Id.* at Exhibit 25 (Children’s Television Programming).

<sup>7</sup> The Licensee also states that the programmer failed to provide the target age range for its programming in the first quarter of 2007. Under Section 73.673 of the Rules a commercial broadcaster is required to provide publishers of programming guides with information identifying programming designed to educate and inform children, including the target age group. 47 C.F.R. § 73.673. Upon review of the record, this violation appears to have been limited to first quarter 2007 and is thereby *de minimis*.

<sup>8</sup> KICU-TV Renewal, Exhibit 25. If a licensee believes that displaying the “E/I” symbol during foreign-language Core Programming would not be meaningful to viewers and compliance would be inconsistent with the public interest, the proper course of action is to request a waiver of the “E/I” requirement under Section 1.3 of the Commission’s rules. 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). Waiver of the Commission’s rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *See Northeast Cellular*, 897 F.2d at 1166. The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). Accordingly, a request for waiver of the “E/I” symbol requirement should include both the reason why waiver is appropriate and propose an on-screen solution that will allow viewers of foreign-language programming to identify, in a meaningful way that is consistent with the underlying purpose of the “E/I” symbol requirement, programming that has been specifically designed to educate and inform children. *See 2004 Report and Order*, 19 FCC Rcd at 22958-60 (displaying the “E/I” symbol “help[s] parents and other identify core programs without deterring potential child viewers” and “maximize[s] public access to information about Core Programming while minimizing the cost to licenses”).

<sup>9</sup> The Station disclosed its failure to display the “E/I” symbol in its Children’s Television Programming Reports (FCC Form 398) for all the relevant quarters.

### III. DISCUSSION

5. The Licensee failed identify children's programming on its Korean-language digital multicast channel by properly displaying the "E/I" symbol during the first quarter of 2007 and the first quarter 2012 through third quarter 2013. Likewise, the Licensee has failed to properly display the "E/I" symbol on its Chinese-language digital multicast channel since the first quarter 2011. Failing to display the "E/I" symbol constitutes an apparent willful and/or repeated violation of Section 73.671 of the Rules. The fact that the Station's programmers may have failed to insert the "E/I" symbol into the programming does not relieve the Station or Licensee of responsibility for the violation. In this regard, the Commission has consistently held that a licensee's reliance on a program's source or producer for compliance with our children's television rules and policies will not excuse or mitigate violations which do occur.<sup>10</sup> Furthermore, although the Station has worked (or is working) to correct the problem, this does not relieve the Licensee of liability for the violations that have already occurred.<sup>11</sup>

6. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have "willfully and/or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission...shall be liable to the United States for a forfeiture penalty."<sup>12</sup> Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.<sup>13</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>14</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>15</sup> Section 312(f)(2) of the Act provides that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."<sup>16</sup>

7. The Commission's *Forfeiture Policy Statement* and Section 1.80(b) of the Rules establish a base forfeiture amount of \$8,000 for violations of the Commission's children's requirements.<sup>17</sup> In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(E) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>18</sup> Based on our review of the facts and circumstances, including the duration of the violation, we find that the Licensee is liable for a forfeiture in the amount of \$3,000 for its apparent willful and/or repeated violation of Section 73.671 of the Rules.

<sup>10</sup> See, e.g., *WTXX, Inc.*, Letter, 22 FCC Rcd 11968 (2007); *Max Television of Syracuse, L.P.*, 10 FCC 8905 (1995).

<sup>11</sup> See *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969) (Permitting mitigation as an excuse based upon corrective action following a violation would "tend to encourage remedial rather than preventive action.").

<sup>12</sup> 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(1).

<sup>13</sup> 47 U.S.C. § 312(f)(1).

<sup>14</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>15</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>16</sup> 47 U.S.C. § 312(f)(2); see also *Callais Cablevision, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 (2001).

<sup>17</sup> See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd. 303 (1999); 47 C.F.R. § 1.80(b), note to paragraph (b)(8), Section I.

<sup>18</sup> 47 U.S.C. § 503(b)(2)(E); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(8) and note to paragraph (b)(8), Section II.

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that KTVU, LLC, licensee of Station KICU-TV, San Jose, California, is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of three thousand dollars (\$3,000) for its apparent willful and repeated violations of Sections 73.671 and 73.673 of the Commission's Rules.

9. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's Rules, that within thirty (30) days of the release date of this *NAL*, KTVU, LLC, SHALL PAY the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the *NAL*/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

11. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, ATTN: Evan Morris, Attorney-Advisor, Video Division, Media Bureau, Room 2-C827 and MUST INCLUDE the *NAL*/Acct. No. referenced above.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.<sup>19</sup>

13. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.<sup>20</sup>

<sup>19</sup> See *San Jose State Univ.*, 26 F.C.C. Rcd. 5908 (2011) (noting that "[t]ypically, the Commission uses gross revenue as the primary measuring stick by which it evaluates a licensee's ability to pay. Other financial indicators may be considered....").

<sup>20</sup> See 47 C.F.R. § 1.1914.

14. **IT IS FURTHER ORDERED** that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to KTVU, LLC, Two Jack London Square, Oakland, CA 94607, and to its counsel, Christina H. Burrow, Cooley LLP, 1299 Pennsylvania Avenue, NW, Suite 700, Washington, DC 20004.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman  
Chief, Video Division  
Media Bureau